IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE TWENTIETH DAY OF APRIL
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE J.CHELAMESWAR

AND
THE HON'BLE MR JUSTICE GHULAM MOHAMMED

WRIT PETITION No.2753 OF 2005

Between:

1. M/s. Neel Madhav Mining Pvt Ltd., C/o. G. Ramakrishan,

Flat No.25, 4th Floor, Emerald Atrium Apartments, adjacent

to House of M.V.S. Murthy, (MP), House, Opp. Waltair Club

Uplands, Visakhapatnam-530 003.

2. Sri G. Ramakrishan, Flat No. 25, 4th Floor, Emerald Atrium

Apartments, adjacent to House of M.V.S. Murthy (Mp) House,

Opp. Waltair Club Uplands, Visakhapatnam-530 003.

3. Mrs. Gunnam Madhvi, W/o. Sri Gunnam Ramakrishna,

Flat No. 25th, 4th Floor, Emerald Atrium Apartments,

adjacent to House of M.V.S. Murthy, (MP), House,

Opp. Waltair Club Uplands, Visakhapatnam-530 003.

..... PETITIONERS

AND

1 The Authorised Officer, Union of Bank of India, SSI-Finance Branch,
12-4-32, 1st Floor, Chandus Plaza, Apsara Road,
Visakhapatnam - 530 002.

2 The Union Bank of India, rep. by its Chief Manager, 12-4-32,

1st Floor, Chandus Plaza, Apsara Raod, Visakhapatnam- 530 002.

3 The Debt Recovery Tribunal, rep. by its Registrar, Isnar Khazana

Towers, 2nd Lane, Dwarakanagar, Visakhapatnam. A.P.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue a Writ of Certiorari or any other appropriate Writ or Order or Direction in the nature of the writ under Article 226 of the Constitution of India quashing the order passed in I.A.No.655 of 2004 in O.A.No.101 of 2004 on the file of Debt Recovery Tribunal, Visakhapatnam, dated 09.12.2004.

Counsel for the Petitioners: MR.CH.SIVA REDDY

Counsel for the Respondent Nos.1 & 2: MR.A.KRISHNAM RAJU

SC FOR THE UNION BANK OF INDIA

The Court at the stage of admission made the following :

O R D E R

(Per Sri Justice J.Chelameswar)

The petitioners filed this writ petition with the prayer as follows:

> *"For the reasons stated in the accompanying affidavit filed in support of the above Writ Petition the petitioners herein pray that this Hon'ble Court may be pleased to issue a Writ of Certiorari or any other appropriate Writ or Order or Direction in the nature of the writ under Article 226 of the Constitution of India quashing the order passed in I.A.No.655 of 2004 in O.A.No.101 of 2004 on the file of Debt Recovery Tribunal, Visakhapatnam, dated 09.12.2004 and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."*

Notice before admission was ordered on 21.02.2005. The respondent-bank is served. Heard the learned counsel for the petitioner and the respondent-bank.

The petitioners borrowed certain amounts from the Union Bank of India, and the officers of the Bank are shown as respondents 1 and 2 in the writ petition. As per the affidavit filed in support of the writ petition, an amount of Rs.126.65 lakhs was borrowed in

connection with the export business carried on by the petitioners. It appears that there was a default in making the payment of instalments as agreed between the petitioners and the bank, and therefore, the respondent-bank filed a suit before the Tribunal constituted under 'The Recovery of Debts Due to Banks and Financial Institutions Act, 1993', which is popularly known as
Debt Recovery Tribunal. It appears from the evidence that certain properties belonging to the petitioners are mortgaged with the respondent-bank in connection with the above-mentioned loan transaction. In the above-mentioned suit it appears that the bank has also sought a decree for sale of the mortgaged property.

Simultaneously, the respondent-bank also invoked the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'). Initially the petitioners approached this Court challenging the provisions of the above-mentioned Act by way of Writ Petition No.15459 of 2003 and obtained an interim order. Eventually, the said writ petition came to be dismissed in view of the decision of the Supreme Court reported in ***MARDIA CHEMICALS LTD***. V/s. ***UNION OF INDIA***, wherein a similar attack on the said Act was repelled by the Supreme Court.

The principal challenge before the Supreme Court as well as in the above-mentioned writ petition is with regard to the power vested in the creditor such as the respondent-bank under Section 13 of the Act. The Supreme Court while upholding Section 13 of the Act, however, laid down certain safeguards to be observed while invoking the power under Section 13 of the Act. Para-80 of the judgment of the Supreme Court runs as follows:

> *"80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:*
>
> > *1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days' notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at*

that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court."

Further, the Supreme Court struck down Section 17(2) of the Act which required the person, intending to avail the right of appeal created under Section 17(1) of the Act against any decision taken under Section 13(4) of the Act, to deposit 75% of the amount claimed by the creditor. As a matter of fact, it is required to be stated that pursuant to the decision of the Supreme Court, Section 17(2) of the Act itself came to be obliterated from the statute book by an ordinance.

The respondent-bank issued a demand notice dated 24.06.2003 as contemplated under Section 13(2) of the Act demanding payment of an amount of Rs.73,63,604-74 ps. along with interest. The bank further issued a notice dated 29.09.2004 invoking the provisions under Section 13(4) of the Act proposing to take possession of the landed property alleged to have been mortgaged by the petitioners. Aggrieved by the decision of the respondent-bank to proceed under Section 13(4) of the Act against the mortgaged property, the petitioners preferred an appeal being Appeal No.101 of 2004 before the third respondent, *inter alia*, contending that the property in dispute is an agricultural land and the same cannot be taken possession of by the bank in exercise of powers under Section 13(4) of the Act, since the agricultural lands are exempted from purview of the Act as provided under Section 31(i) of the Act. Along with the appeal, the petitioners filed an Interlocutory Application being I.A.No.655 of 2004 seeking stay of the operation of the notice dated

29.09.2004 issued under Section 13(2) of the Act. By the order impugned in the writ petition, the Tribunal granted stay of taking possession of the property in dispute on condition the petitioners deposit an amount of Rs.20.00 lakhs into the Tribunal or into the loan account of the Bank on or before 22.02.2005 with a default clause. Hence, the present writ petition.

The learned Senior Counsel Mr.K.Subramanya Reddy appearing for the petitioners argued that the imposition of a condition like the one imposed by the impugned order would be inconsistent with the right that is asserted by the petitioners and it also tantamounts to irrational exercise of the discretion vested in the Tribunal.

The learned senior counsel further argued that while the main issue in the appeal as well as in the Interlocutory Application is the legality and the jurisdiction of the respondent-bank to take possession of the land in dispute, and on the face of the assertion of the petitioners that the land in dispute is agricultural land, the imposition of a condition such as the one imposed in the impugned order would virtually negate the right of the petitioners or would compel the petitioners to part with the possession of the property in the event of their inability to comply with the conditions stipulated therein.

The learned senior counsel also submitted that if the land in dispute is eventually established that it is an agricultural land, the notice under Section 13(4) of the Act, referred to earlier, would be clearly beyond the jurisdiction of the respondent-bank and for a determination of such a question, if the petitioners are compelled to deposit a substantial amount, such a condition would be an irrational exercise of the discretion vested in the Tribunal while granting interim stay.

The learned counsel Mr.A.Krishnam Raj appearing for the respondent-bank argued that though the Supreme Court struck down Section 17(2) of the Act, it recognised that the Debt Recovery Tribunal in exercise of jurisdiction under Section 17(1) of the Act, would still have the discretion to impose such conditions as are deemed fit and proper while granting an interim order and the condition stipulated in the order impugned in the present writ petition is such a condition imposed, in exercise of such discretionary power vested in the Debt Recovery Tribunal.

The learned counsel also argued that even assuming that the impugned order is illegal for any reason, the petitioners have a statutory remedy of appeal available against the impugned order, and therefore, the interference of this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution is not warranted.

The argument of the learned counsel for the respondent-bank as to the availability of an alternative remedy of statutory appeal is required to be dealt with first.

It is a settled principle of law that the existence of an alternative remedy is not a bar for exercise of jurisdiction under Article 226 of the Constitution of India, but it is only one of the relevant considerations, which should guide the court while exercising jurisdiction under Article 226 of the Constitution. In a case like the one before us, where the question is principally about the legality and the jurisdiction of the authority, which initiated action against the petitioners, this Court would not normally be reluctant to deny the access to the petitioners to invoke jurisdiction under Article 226 of the Constitution, more particularly where the interpretation of the enactments, which are of recent origin, is involved, and where the precedents are lacking to guide the statutory Tribunal constituted under the Act. We, therefore, reject the submission of the learned counsel for the respondent-bank based on the availability of alternative remedy.

Coming to the main question – whether the condition such as the one imposed by the impugned order is irrational one, we accept the submission made by the learned senior counsel for the petitioners. The principal question in the appeal before the Debt Recovery Tribunal, which incidentally is also relevant for the purpose of deciding the interlocutory application as to whether the action of the respondent-bank in invoking Section 13(4) of the Act and proposing to take possession of the land in dispute is legal and within the jurisdiction of the bank? No doubt,
Section 13(4)(a) of the Act authorises the creditor such as the respondent-bank to take possession of the secured assets of the borrowers. But by virtue of the declaration made under Section 31 of the Act, the provisions of the Act do not apply to '*any security interest created in agricultural land*'. Therefore, the expression '*secured assets*' occurring under Section 13(4)(a) of the Act must necessarily be interpreted as an asset other than agricultural land. The question, of course, whether the land in question is an agricultural land or not, requires to be decided on the basis of appropriate evidence to be led in the appeal.

But, at the stage of considering the interlocutory applications, the Tribunal, while deciding the question whether the creditor can be permitted to take possession of agricultural land or not, cannot totally ignore the plea of the debtor that the land is an agricultural land and impose a condition such as the one imposed in the impugned order. In our view, such a condition tantamounts to placing a premium on the constitutional right of the petitioners under Article 300-A of the Constitution. Any person, who is not in a position to comply with such an onerous condition would, in effect, be deprived of his right to the enjoyment of the property i.e. agricultural land, a consequence which is not intended under the Scheme of the Act. In the circumstances, we are of the opinion that the order under appeal insofar as it granted interim stay of taking of possession of the property in dispute on condition the petitioners deposit an amount of Rs.20.00 lakhs, is an order passed in exercise of the discretion, no doubt, vested in the Tribunal, but we must conclude that such a discretion was exercised irrationally.

The object of authorising the creditors to take possession of the assets of the debtors appears to be to safeguard the interests of the creditors in the event of successful culmination of the proceedings under the Act or under the proceedings before the Debt Recovery Tribunal. The object could still be achieved by injuncting the petitioners from alienating the property in dispute or from creating any encumbrance in the property or altering its nature or by ordering both particularly when the dispute is whether the asset is amenable to the jurisdiction under Section 13(4) of the Act or not.

We therefore, allow the writ petition and declare that the imposition of condition of depositing Rs.20.00 lakhs for availing the injunction granted by the Tribunal is illegal. However, we direct the petitioners not to alienate or create any encumbrance or in any way alter the nature of the property during the pendency of the appeal, wherein the question whether the property in dispute is agricultural land or not, would be decided by the Tribunal. In the circumstances, there shall be no order as to costs.

JUSTICE J.CHELAMESWAR

JUSTICE GHULAM MOHAMMED

20th APRIL, 2005

PGS

To

1 The Authorised Officer, Union of Bank of India, SSI-Finance Branch,
12-4-32, 1st Floor, Chandus Plaza, Apsara Road,
Visakhapatnam - 530 002.

2 The Chief Manager, Union Bank of India, 12-4-32, 1st Floor,
Chandus Plaza, Apsara Raod, Visakhapatnam- 530 002.

3 The Registrar, The Debt Recovery Tribunal, Isnar Khazana

Towers, 2nd Lane, Dwarakanagar, Visakhapatnam. A.P.

4 2 CD copies.

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AND
THE HON'BLE MR JUSTICE

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WRIT PETITION No.2753 OF 2005

(Per Sri Justice J.Chelameswar)

20th APRIL, 2005